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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARGARET T. WHITACRE,
Petitioner,

v.

JAMES F. DAVEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether direct evidence of unconstitutional discriminatory motive must be pleaded to state a claim under *Bivens*, when a requirement of direct evidence of motive is found nowhere in our jurisprudence, and when this Court has repeatedly held that direct evidence is not required to prove unconstitutional discriminatory intent.

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MARGARET T. WHITACRE,
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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Margaret T. Whitacre hereby petitions this Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, 1a) is reported at 890 F.2d 1168. The opinion of the district court (App. *infra*, 15a) is reported at 727 F. Supp. 636.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1989. *See* App., *infra*, at 14a. The court of appeals denied rehearing and rehearing *en banc* on January 5, 1990. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

There are no statutory provisions involved. The constitutional provision is the Fifth Amendment.

STATEMENT

This case arises out of Ms. Whitacre's attempts to redress the injuries she suffered when she was discriminated against in her employment with the Office of the Clerk of the United States District Court for the District of Columbia on the basis of her age. The undisputed facts [1] are as follows:

In August 1985, Ms. Whitacre was 51 years old and had been employed by the Office of the Clerk for eighteen years. She was a grade 14 Assistant Clerk and, next to the Clerk of the Court, James Davey, was the highest-ranked employee in the Office of the Clerk. In Davey's absence, in fact, Ms. Whitacre acted as the Clerk of the Court.

Ms. Whitacre performed outstandingly in her tenure with the Office of the Clerk. She received the highest performance ratings and garnered praise and awards for her performance and skill from Mr. Davey and from the Chief Judge of the District Court, Aubrey E. Robinson, Jr. Davey recognized and rewarded in particular Ms. Whitacre's demonstrated leadership and supervisory abilities. On July 19, 1985, in a formal memorandum, Davey praised Ms. Whitacre's skillful and dedicated performance.

Not three weeks later, Ms. Whitacre received stunning news from Mr. Davey: he told her that he intended to strip her of her managerial and supervisory duties and demote her by at least two grade levels. Davey suggested that Ms. Whitacre "voluntarily" resign to avoid this action. When questioned, Davey asserted that he planned

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[1] This case arises on appeal of the grant of Mr. Davey's motion to dismiss; therefore all facts as pleaded by Ms. Whitacre must be accepted as true. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Indeed, Mr. Davey filed no answer, no exhibits, and no affidavits in support of his motion. Accordingly, there are no facts anywhere in the record that could place the factual allegations of Ms. Whitacre's amended complaint in contest.

to "reorganize" the Office of the Clerk—later he admitted that he planned to place a younger, lower-graded employee, Nancy Mayer, in the new position of Chief Deputy Clerk that would encompass Ms. Whitacre's Assistant Clerk duties. Ms. Mayer is some twenty years younger than Ms. Whitacre, and at the time was serving in the other, lower-graded Assistant Clerk position in the Office.

In late August, Mr. Davey spoke to Ms. Whitacre to confirm his plan to promote the younger employee, and to demote Ms. Whitacre and strip her of her managerial duties. He again suggested that Ms. Whitacre "voluntarily" resign. She did not. Instead, Ms. Whitacre applied for the new Chief Deputy Clerk position. Not surprisingly, Davey carried through with his previously-announced plan: he selected the younger Ms. Mayer as Chief Deputy Clerk, and relegated Ms. Whitacre to a low-level, non-supervisory staff position in the Office of the Clerk.

Ms. Whitacre believed that Davey's decision was unfairly based on an impermissible consideration: her age. Her qualifications for the position of Chief Deputy Clerk were beyond question—she knew the work and she did it well. Davey himself had rated her performance of the very duties of this position as "excellent," and had formally praised her performance less than a month before he told her of his decision to select someone else. Davey's original positive assessment was shared by others, including the Chief Judge of the District Court. In all his comments on Ms. Whitacre's performance, Davey did not articulate a reason for his decision to strip Ms. Whitacre of her managerial duties. He asserted only that "some employees" had complained, but could identify neither the employees nor the nature or basis of their complaints.

Davey had, however, readily identified his intended selectee: an employee who was twenty years younger than Ms. Whitacre. This was consistent with Davey's selec-

tions for the five years preceding this selection: seventeen of the twenty individuals Davey had selected in the Office of the Clerk were no older than 42—and averaged 35 years in age. In short, the objective evidence supported Ms. Whitacre's belief that Mr. Davey preferred hiring younger employees—a preference that caused her own demotion.

Ms. Whitacre accordingly appealed Davey's decision through the EEO grievance procedure of the Office of the Clerk. Her complaint was investigated and decided by a close personal friend of the selectee Ms. Mayer—LeeAnn Flynn. The outcome was a foregone conclusion. After taking the unusual step of denying Ms. Whitacre the opportunity for an evidentiary hearing on her claim,[2] Ms. Flynn concluded that selection of her close personal friend, and the non-selection and demotion of Ms. Whitacre, were not the product of unlawful discrimination by Davey. Ms. Flynn's recommended decision, and the record Ms. Flynn had developed to support her recommendation, were forwarded to Chief Judge Robinson who upheld the recommendation.

Ms. Whitacre had no further recourse. She accordingly filed a civil action in federal district court asserting in a *Bivens*[3] claim that Davey had violated her Fifth Amendment right to equal protection when he demoted Ms. Whitacre and promoted the younger Ms. Mayer, on the basis of Ms. Whitacre's age.[4] Ms. Whitacre's amended complaint set forth in detail the evidence recounted above. This evidence is circumstantial, but it was never dis-

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[2] This was the first time in Ms. Whitacre's tenure at the Office of the Clerk that a requested hearing was denied.

[3] *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[4] Ms. Whitacre also claimed that Flynn's review of her charge violated her due process right to a fair and impartial adjudicator. Rehearing was not sought on the panel's decision regarding this claim and it is not at issue here.

puted that these detailed allegations would have survived a motion to dismiss under this Court's precedents in both constitutional and statutory discrimination cases. *E.g.*, *Washington* v. *Davis*, 426 U.S. 229 (1976); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).[5]

Instead of filing an answer, Davey moved to dismiss the complaint contending that the *Bivens* claim was barred by his qualified immunity from civil damages liability. The district court granted Davey's motion, finding that in light of Davey's assertion of qualified immunity, Ms. Whitacre's complaint failed to sufficiently allege Davey's unconstitutional motive. The District of Columbia Circuit affirmed, expressly stating that Ms. Whitacre's complaint was required to contain allegations of direct—not circumstantial—evidence of unconstitutional motive in order to overcome Davey's assertion of qualified immunity. After denial of rehearing, this petition timely followed.

REASONS FOR GRANTING THE PETITION

This case presents issues of substantial public importance concerning the scope of the qualified immunity standard established in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and its application to cases in which subjective intent is an essential element of the constitutional claim. In resolving defendant Davey's claim of qualified immunity, the court below held inconsequential the richly detailed circumstantial evidence of motive in Ms. Whitacre's complaint—the court insisted upon the pleading of direct evidence of motive.

Harlow did not address this issue, and the lower courts are in disarray as a result. The "direct evidence rule" adopted below is irreconcilable with this Court's prece-

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[5] In addition to detailed allegations that set forth prima facie evidence of Davey's discriminatory motive, the amended complaint contained specific, detailed allegations demonstrating that Davey's purported reasons were pretextual, and detailing the available objective evidence concerning Davey's past hiring decisions.

dents, and it is inconsistent with the approach taken by a majority of the circuits that have considered the issue, as well as with the general body of American jurisprudence, and employment discrimination law in particular. Application of this rule bars redress of acts of unconstitutional discrimination by government officials under *Bivens*, and threatens to reach beyond *Bivens* to hamstring statutory claims brought to remedy unconstitutional discrimination by local officials. Review by this Court is necessary to resolve the split in the circuits on this issue and to provide guidance to the lower courts in an area that has proved especially susceptible to divergent and often absurd results.

1. Federal, state, and local government officials may be liable for civil damages when they abuse their office to deprive an individual of his constitutional rights. Officials performing discretionary functions, however, have been granted a qualified immunity from civil damages liability to the extent their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. at 818.[6]

Harlow eliminated inquiry into an official's state of mind to determine whether he "actually knew" that his conduct violated constitutional rights and instead established an objective test based on the state of the law at the time the conduct occurred. *Id.* In one important class of cases, however, the official's state of mind is an element of the substantive offense claimed, *e.g.*, intentional discrimination. *Harlow* gave no guidance on the application of its objective qualified immunity inquiry in these cases. Lower courts, however, have since applied *Harlow* to severely restrict this important class of claims.

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[6] The nature of qualified immunity is the same whether the individual asserting it is a federal, state or local official. *Butz* v. *Economou*, 438 U.S. 478, 504 (1978); see, *infra*, pp. 8, 14.

In this case, it was assumed by the parties and the courts below that the Fifth Amendment right Ms. Whitacre asserted was "clearly established," and was one of which a reasonable official would have known.[7] Davey's conduct violated this clearly established right if, and only if, he acted with a discriminatory motive. The "qualified immunity" inquiry thus turned on the question of Davey's motive.

The narrow issue presented here is the evidentiary burden triggered by Davey's claim of qualified immunity. The court below required Ms. Whitacre to counter the assertion of official immunity with *direct* evidence of Davey's unconstitutional motive. The lower court acknowledged that there was ample circumstantial evidence in the complaint from which to infer Davey's discriminatory motive. App. 4a. But because the evidence was circumstantial, and not direct, the court held that no claim was stated and it dismissed the case.

This holding renders meaningless the right of action established in *Bivens*. It creates and imposes an evidentiary burden novel in American jurisprudence—a burden found nowhere in the Constitution, and a burden more stringent even than that required to convict and sentence an individual to death. And it requires that this burden be discharged in a complaint filed under federal "notice pleading" rules, before even limited discovery can take place. To read *Harlow* to impose such insurmountable barriers to suit is to grant government officials a "license to lawless conduct"—the very result *Harlow* eschewed. 457 U.S. at 819. The decision below instructs

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[7] It was also assumed in the lower court that Ms. Whitacre could bring a *Bivens* claim to redress the age-based discrimination by Mr. Davey. Indeed, as this Court held in *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312-14 (1976), an age-based classification by the government implicates the constitutional guarantee of equal protection. The judicial branch positions at issue are not covered by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, 633a.

government officials simply to keep their own counsel when acting with unconstitutional motive; if they do so, according to the D. C. Circuit, *Harlow* frees them of liability absolutely.

The question of the kind of evidence of unconstitutional motive required to overcome an assertion of official immunity has arisen repeatedly and will continue to arise in courts throughout the country. Lacking guidance from this Court, the circuits have reached results inconsistent with one another and with our history of jurisprudence. Different levels of immunity for federal, state and local officials have been established, in derogation of this Court's stern admonition that such a distinction is "untenable" and "turns the constitutional design on its head." *Butz* v. *Economou*, 438 U.S. at 504. Review by this Court is necessary to settle this recurring issue and to resolve the presently irreconcilable differences among the circuits.

2. Lower courts have reached divergent conclusions in applying *Harlow*'s guidelines for qualified immunity analysis in cases in which the motive of the official is an essential element of the substantive constitutional claim. While courts generally agree that a plaintiff in such cases is held to a "heightened pleading standard," (but see *infra.* n.10), and must proffer "specific, nonconclusory allegations" of motive, *e.g.*, *Easter House* v. *Felder*, 852 F.2d 901, 919-20 (7th Cir. 1988); *Gutierrez* v. *Municipal Court*, 838 F.2d 1031, 1051 (9th Cir. 1988), *vacated as moot*, 109 S.Ct. 1736 (1989); *Pueblo Neighborhood Health Centers* v. *Losavio*, 847 F.2d 642, 649 (10th Cir. 1988); *Poe* v. *Haydon*, 853 F.2d 418, 432 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 788 (1989), few courts have defined the kind of evidence that will meet this standard.[8]

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[8] The District of Columbia Circuit originally likened this "heightened" standard to the requirement in Fed. R. Civ. P. 9(b) that allegations of fraud be pleaded with "particularity." *Martin* v. *Malhoyt*, 830 F.2d 237, 257 (D.C. Cir. 1987). Detailed allegations of

The District of Columbia Circuit, however, is the only Court of Appeals to require a plaintiff to plead direct, and not just detailed circumstantial, evidence of motive in order to state a claim. This result directly conflicts with other circuits that have considered the issue.

The Sixth Circuit recently addressed the issue in *Crutcher* v. *Commonwealth of Kentucky*, 883 F.2d 502, 504 (6th Cir. 1989), and soundly rejected the position adopted by the court below that a plaintiff must have direct evidence of motive to overcome the qualified immunity defense. In *Crutcher*, the court expressly held that "as in other cases . . . inferential and circumstantial proof" of motive would be sufficient. *Id.* Similarly, in *Collinson* v. *Gott*, 895 F.2d 994, 1002-1003 (4th Cir. 1990) (Phillips, J., concurring), a decision in which the panel itself was split, Judge Phillips endorsed the requirement that unconstitutional motive be pleaded with specific nonconclusory allegations.[9] He also made plain, however, that circumstantial evidence alone would be sufficient to carry this burden. *Id.* at 1003. The Second Circuit tacitly reached the same result in *Musso* v. *Hourigan*, 836 F.2d 736, 742-43 (2d Cir. 1988), when it rejected an official's qualified immunity defense solely on the basis of circumstantial evidence of motive.

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circumstantial evidence of fraud, however, meet Rule 9(b)'s requirement. *See, e.g.*, C. Wright, *Federal Practice and Procedure*, § 1298 (1969 & 1989 Supp.), and cases cited therein. The D.C. Circuit plainly abandoned its original definition in the case below, and has subsequently reaffirmed this more restrictive application of the standard. *Siegert* v. *Gilley*, 895 F.2d 797, 803 (D.C. Cir. 1990) (finding *Bivens* complaint to lack the "noncircumstantial proof required to satisfy our heightened pleading standard").

[9] There was no majority opinion on this narrow issue. Judge Phillips and Judge Butzner agreed that defendant Gott appropriately raised qualified immunity, but Judge Butzner did not agree with the grant of summary judgment. Judge Wilkinson voted to uphold the grant of summary judgment, but would have applied absolute immunity (a level of immunity never claimed or raised by Gott). This opinion itself is compelling testimony of the confusion that abounds in and among the circuits.

Crutcher, *Collinson*, and *Musso* all stand in conflict with the decision of the court below on the narrow question of whether, in a case in which substantive law makes the official's motive an essential element of the constitutional violation, circumstantial evidence of motive can alone suffice to withstand a qualified immunity defense. While in an analogous context this Court has held that discriminatory unconstitutional motive—the violation alleged in this case—need not be established through direct evidence, *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982), *citing Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); *Washington* v. *Davis*, 426 U.S. at 242, this issue has never before come to this Court in the context of official qualified immunity. Review by this Court is required in this case of first impression to harmonize the courts' discordant holdings.

3. This case is an especially appropriate one for plenary review by this Court as it brings into sharp focus the issue left open by *Harlow*, and highlights the need for guidance from this Court: in an effort to apply *Harlow* the lower court established a plainly unworkable requirement of proof utterly at odds with American jurisprudence, and directly contrary to precedent of this Court.

a. Ms. Whitacre did not plead direct evidence of Davey's motive, and it is this omission that the court saw as fatal. This insistence on direct evidence of motive has no foundation in our system of law. There is nothing talismanic about direct evidence, and historically the law has not recognized any differences in probative value as between direct and circumstantial evidence. *E.g.*, *Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960) ("Direct evidence of a fact is not required."); 1 L. Sand, *et al.*, *Modern Federal Jury Instructions*, Instr. 5-2, 74-2. Indeed, circumstantial evidence alone may be used to meet the stringent criminal standard of proof of specific intent beyond a reasonable doubt—and to sentence a con-

victed defendant to death. *E.g.*, *Holland* v. *United States*, 348 U.S. 121, 140 (1954) (circumstantial evidence sufficient to establish guilt beyond a reasonable doubt); D.C. Criminal Jury Instructions, Instr. 4.21 (Murder in the First Degree—Premeditated) (circumstantial evidence used to establish specific intent); Md. Code Ann. Art. 27 § 413(c) (evidence used in death penalty sentencing).

There is only one question of fact in all of American jurisprudence that requires direct evidence: by specific Constitutional imperative, direct evidence of overt acts is required to sustain a conviction for treason. U.S. Const. Art. 3, § 3, cl. 1. Yet even here a defendant's underlying treasonable motive can be proved by circumstantial evidence. *Cramer* v. *United States*, 325 U.S. 1, 31 (1945). The simple reason for this result is found in basic principles of proof:

> What is designed in the mind of an accused never is susceptible of proof by direct testimony. If we were to hold that the disloyal and treacherous intention must be proved by [direct evidence] it would be to hold that it is never provable.

Id. Thus, as in all other areas of the law in which motive is at issue, this Court held that the "usual process" of judging standard common-law evidence suffices to establish motive in a treason case. *Id.* at 32-33.

There is no legitimate reason to treat the issue of discriminatory motive differently. In fact, to do so ignores this Court's admonition in *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1792 (1989), that discrimination is to be treated no differently from other questions of fact. In an extraordinary departure from Anglo-American jurisprudence, the court below required Ms. Whitacre to provide direct evidence of Davey's invidious motive in her complaint—to prove the unprovable or be denied judicial redress. This Court never intended the *Bivens* remedy to be so hollow.

b. The lower court's decision also is the first decision ever to hold that direct evidence of motive, *i.e.*, a "smok-

ing gun", is a necessary element of an employment discrimination case. This break from EEO precedent is not required by adherence to *Harlow*, and it invites an erosion of well-established principles of proof in other areas of employment discrimination law.

This Court has long recognized that circumstantial evidence is probative of intent and can be used in constitutional claims to establish unlawful discriminatory motive —without any direct evidence at all. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. at 265-258 (Fourteenth Amendment violation); *Washington* v. *Davis*, 426 U.S. at 241-42 (Fifth Amendment violation). And in federal employment discrimination claims the role of circumstantial evidence of intent is so firmly established that this Court has developed a framework to ensure its orderly evaluation. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792; *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) (Title VII).

The *McDonnell Douglas/Burdine* framework did not create a novel means of proving disputed facts. Rather, it simply provided for employment discrimination cases "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978), that courts have since used in each context in which intentional discrimination arises in federal law. *See, e.g., General Building Contractors Association* v. *Pennsylvania*, 458 U.S. 375, 389-90 (1982) (§ 1981 claim); *Oates* v. *District of Columbia*, 824 F.2d 87, 90-91 (D.C. Cir. 1987) (§ 1983 claim); *Coburn* v. *Pan American World Airways, Inc.*, 711 F.2d 339 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983) (claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621). State and local forums nationwide also have adopted the standard in discrimination claims. *E.g., Watson* v. *Department of Rehabilitation*, 212 Cal. App. 3d 1271, 1278 (Cal. 1989); *Harris* v. *D.C. Com-*

mission on Human Rights, 562 A.2d 625, 630-31 (D.C. 1989); *Shah* v. *Illinois Human Rights Commission*, 548 N.E.2d 695, 700 (Ill. 1989). At bottom, this evidentiary framework responds to the reality acknowledged by this Court in *Cramer* nearly half a century ago—motive is rarely, if ever, revealed directly. *See United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983).

Notably, with the exception of the decision below, whenever a "direct evidence" requirement has been proposed to resolve the issue of motive, it has been soundly rejected as a ploy that would nullify the entire substantive charge. *E.g.*, *Cramer* v. *United States*, 325 U.S. at 31 (motive in treason case); *Carter* v. *Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1232 (D.C. Cir. 1984) (in race discrimination case under § 1981 "imposition of a direct evidence requirement is without precedent, and, in this time of sophisticated employers would effectively eviscerate" the statute). And in the specific context of this employment discrimination case, as the Sixth Circuit aptly noted, the direct evidence requirement spawns a "deformity in civil rights law." *Crutcher* v. *Commonwealth of Kentucky*, 883 F.2d at 504.

Harlow did not involve a claim in which invidious motive was a substantive element.[10] Nothing in *Harlow* or existing constitutional or discrimination law precludes a plaintiff from using circumstantial evidence to meet any "heightened" pleading standard. Nevertheless, the court below expressly abandoned the standard method of proof of motive in employment discrimination cases. The

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[10] There is some indication that *Harlow* does not properly apply to such cases, *e.g.*, *Anderson* v. *Creighton*, 483 U.S. 635, 657 n.12 (Stevens, J., dissenting); *Gutierrez* v. *Municipal Court*, 838 F.2d at 1051 n.29; *Goodwin* v. *Circuit Court*, 729 F.2d 541, 545-46 (8th Cir.), *cert. denied*, 469 U.S. 828 (1984); and that in such cases the qualified immunity issue cannot be meaningfully resolved before narrow discovery occurs. *E.g.*, *Anderson* v. *Creighton*, 483 U.S. at 646 n.6.

requirement of direct evidence of motive in the Fifth Amendment employment discrimination claim at issue here drains *Bivens*, and the Fifth Amendment, of meaning.

4. This Court has said that it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz* v. *Economou*, 438 U.S. at 504. Circumstantial evidence of motive is routinely accepted in discrimination claims against local officials under § 1983, *e.g.*, *Gierbolini-Colon* v. *Aponte-Roque*, 848 F.2d 331, 334-35 (1st Cir. 1988); *Musso* v. *Hourigan*, 836 F.2d at 742-43; *Crutcher* v. *Commonwealth of Kentucky*, 883 F.2d at 504; *Van Houdnos* v. *Evans*, 807 F.2d 648, 651 (7th Cir. 1986); including in cases brought in the District of Columbia Circuit. *Oates* v. *District of Columbia*, 824 F.2d at 90-91. The Sixth Circuit has expressly stated that circumstantial evidence of motive is sufficient to overcome a local official's qualified immunity claim. *Crutcher*, 883 F.2d at 504.

By requiring Ms. Whitacre to overcome Davey's qualified immunity defense with allegations of direct evidence of motive in her complaint, the lower court has drawn the very distinction between federal and other officials that this Court flatly rejected as "untenable." *Butz* v. *Economou*, 438 U.S. at 504. The result, as this Court foretold in *Butz*, *id.*, has "turned the Constitutional design on its head": by the reasoning of the court below, the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials.

The lower court's decision simply cannot be applied consistently with existing law. Plenary review by this Court is necesary to establish a practicable and consistent standard of proof of motive under the Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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April 5, 1990

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 13, 1989 Decided November 17, 1989

No. 88-5339

MARGARET T. WHITACRE,
APPELLANT

v.

JAMES F. DAVEY, *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 87-02762)

David H. Shapiro, with whom *Joseph B. Scott* and *Katherine L. Garrett* were on the brief, for appellant.

John Oliver Birch, Assistant United States Attorney, with whom *Jay B. Stephens*, United States Attorney, *John D. Bates*, *R. Craig Lawrence* and *Mark E. Nagle*, Assistant United States Attorneys, were on the brief, for appellees.

Before: RUTH B. GINSBURG, SILBERMAN, and BUCKLEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: This is an appeal from the district court's dismissal of a *Bivens* claim against two court officials who allegedly discriminated in employment against appellant.[1] The district court thought the allegation, which was adequate to allege a statutory violation, was insufficient to make out a constitutional tort. We affirm.

I.

Margaret Whitacre was employed since 1967 by the Office of the Clerk of the United States District Court for the District of Columbia. In August 1985, Whitacre, who was then 51 years old, held one of the two Assistant Clerk positions at a grade 14 level. She was the highest subordinate to James Davey, the Clerk, and in his absence she served as the acting Clerk. On August 8, Davey informed Whitacre of a reorganization of the managerial structure in the Clerk's Office that would result in the creation of a single Chief Deputy Clerk position to replace the two Assistant Clerk jobs. Davey warned her that he intended to remove Whitacre from all managerial responsibilities and place her in a grade 12 position or lower. When Whitacre nonetheless applied for the new Chief Deputy Clerk job, Davey selected Nancy Mayer, the other Assistant Clerk, who was then 31 years old and at that time held a lower grade.

Whitacre lodged an administrative complaint alleging age discrimination with LeeAnn Flynn, the district court's Equal Employment Opportunity ("EEO") Coordinator and the Administrative Assistant to the Chief Judge of the district court. Whitacre requested Flynn to recuse herself from the investigation because of Flynn's allegedly close friendship with Mayer and long association with Davey. Flynn refused, and after an investigation pursuant to the office's informal "Discrimination

[1] This appeal arises from a Rule 12(b)(6) motion to dismiss, so we assume that appellant's allegations of facts in the complaint, but not its legal conclusions, are true.

Complaint Procedures," she found Davey had not discriminated against Whitacre on the basis of age. In accordance with the complaint procedures, Whitacre appealed that report to Chief Judge Robinson, who summarily affirmed Flynn's conclusions.

In October 1987, Whitacre filed a *Bivens*-type [2] action against Davey and Flynn in federal district court. She alleged that Davey discriminated against her on the basis of her age in violation of the fifth amendment's equal protection guarantee. She also claimed that Flynn denied Whitacre her fifth amendment due process right to an unbiased administrative review of her allegations. The complaint demanded $375,000 in compensatory and punitive damages from Davey and Flynn. Upon the defendants' motion, the district court dismissed the complaint for failure to state claims upon which relief could be granted. *See* FED. R. CIV. P. 12(b)(6). This appeal followed.

II.

The primary issue presented to us is whether a complaint that sets forth allegations that would constitute a *prima facie* case in certain statutory discrimination actions, such as under Title VII, satisfies our Circuit's heightened pleading standard for *Bivens* actions.[3] In a

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[2] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (permitting damage actions directly under the Constitution against federal officials for violations of fourth amendment rights). Whitacre alleged a constitutional tort for her age discrimination claim since the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-34, does not cover noncompetitive positions in the judicial branch. *See* 29 U.S.C. § 633a(a).

[3] We are very doubtful whether a *Bivens* action for *age* discrimination can be brought. Unlike race or national origin, age is not a "suspect" classification triggering heightened judicial scrutiny under equal protection analysis. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-14 (1976). Since age discrimination does not implicate a suspect class or a fundamental right, Whitacre may not possess "a compensable injury to a constitu-

Title VII action, a *prima facie* case is made out simply by showing that a qualified plaintiff who is a member of a protected class was disadvantaged in favor of a person who is not a member of the protected class. Upon this demonstration, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the employer carries this burden, the plaintiff then must prove by the preponderance of the evidence that the proffered excuse is merely a pretext for discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas*, 411 U.S. at 804. It follows, then, that if a plaintiff alleges a *prima facie* case, the complaint may not be dismissed for failure to state a claim. We have also applied this allocation of burdens in statutory age discrimination suits brought under the ADEA. *See Coburn v. Pan Am. World Airways, Inc.*, 711 F.2d 339, 342 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983). But for reasons we elaborate below, we conclude that this statutorily inspired allocation of burdens is inapposite for *Bivens*-type cases, and therefore appellant's complaint, which would satisfy the Title VII paradigm, does not adequately allege a constitutional tort.

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tionally protected interest" required to invoke a *Bivens* action. *See Butz v. Economou*, 438 U.S. 478, 504 (1978); *compare Davis v. Passman*, 442 U.S. 228 (1979) (authorizing *Bivens* actions for gender discrimination since sex is a quasi-suspect classification). It may be impossible, moreover, to define the age at which a suspect age classification would begin. In the ADEA, Congress drew the line at age 40, but it is hard to see such a constitutional boundary. *Cf. Lowe v. Commack Union Free School Dist.*, No. 89-7211, slip op. 5825, 5842-45 (2d Cir. Sept. 21, 1989) (rejecting as arbitrary, in an ADEA disparate impact context, the segmenting of the protected class into age subgroups). Because neither the parties nor the district court raised this issue and they instead focused on the adequacy of the allegations of discrimination, we will assume, *arguendo*, that a *Bivens* claim for age discrimination exists.

A cause of action directly under the Constitution encompasses fundamentally different interests than a statutory cause of action such as Title VII. *See Davis v. Passman*, 442 U.S. 228, 241 (1978). In his concurring opinion in *Bivens*, Justice Harlan recognized that the creation of the constitutional cause of action stemmed from the judiciary's historic equitable discretion to grant a traditional remedy at law. *See* 403 U.S. at 405 (Harlan, J., concurring). Thus, the question for the judiciary is "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Id.* at 407. In deciding the contours of *Bivens* actions, "the range of policy considerations we [the courts] may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy." *Id.*

The Supreme Court later embraced the policy-making flexibility that *Bivens* claims afford in crafting the scope of qualified immunity for federal officials. The qualified immunity test originally consisted of both objective and subjective elements. A federal official was liable if "he *knew* or reasonably should have known" that his actions violated an individual's constitutional rights, or if he "took the action with the *malicious intention* to cause a deprivation of constitutional rights or other injury . . ." *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (emphasis added). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court recognized that the subjective elements of that test were "incompatible" with the goal of terminating meritless *Bivens* claims at an early stage. *Id.* at 815-16. The Court explicitly weighed the need to vindicate constitutional guarantees with the "cost[s] not only to the defendant officials, but to society as a whole" when innocent federal officials face money damage claims. *See id.* at 814 (1982). The costs of meritless *Bivens* suits include "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* In light of these

competing interests, the Court required trial judges to identify and quickly terminate "insubstantial lawsuits" at the pleading stage before the commencement of any discovery. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Butz v. Economou*, 438 U.S. 478, 507 (1978). "Bare allegations of malice" do not suffice to expose federal officials "to the costs of trial or to the burdens of broad-reaching discovery." *Harlow*, 457 U.S. at 817-18. Consequently, the Court stripped the qualified immunity test of its subjective elements and held that "government officials performing discretionary functions . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

Since "substantial costs attend the litigation of the subjective good faith of government officials," *Harlow*, 457 U.S. at 816, and since the Court stressed the need to terminate insubstantial *Bivens* claims before trial, *see id.* at 815-16, we have supplanted the liberal pleading requirements of the Federal Rules with a heightened pleading standard whenever a plaintiff in a *Bivens* claim alleges an unconstitutional motive. *See Martin v. Malhoyt*, 830 F.2d 237, 254 (D.C. Cir. 1987); *Smith v. Nixon*, 807 F.2d 197, 200 (D.C. Cir. 1986); *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984) (dicta). Under our heightened pleading requirement, Whitacre's complaint of age discrimination must include "nonconclusory allegations of evidence of such intent" in order to survive a motion to dismiss. *Hobson*, 737 F.2d at 29. The allegations of facts must be specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity. *See Martin v. Malhoyt*, 830 F.2d at 254. And we have imposed, in cases where the defendant's subjective intent is an essential part of the claim, a demanding requirement on the plaintiff in order to proceed to trial or obtain discovery. *See Martin v. D.C.*

Metro. Police Dep't, 812 F.2d 1425, 1435 (D.C. Cir. 1987). "[T]o avert dismissal short of trial, [the plaintiff] must come forward with something more then inferential or circumstantial support for his allegation of unconstitutional motive. That is, some *direct evidence* that the officials' actions were improperly motivated must be produced if the case is to proceed to trial." *Id.* (emphasis added).[4]

Whitacre argues that the degree of specificity needed to make out a Title VII or statutory age discrimination *prima facie* case meets our heightened pleading standard when the constitutional tort alleged is of the same discrimination genre covered by the antidiscrimination statute. We disagree. The minimum Title VII *prima facie* case is composed of only circumstantial evidence, and not overwhelming circumstantial evidence at that. The judiciary has adopted that device both because the legislation interpreted specifically sought to aid members of a protected class,[5] and because switching the burden of pleading to an employer (who has better access to all the information) to give the nondiscriminatory reason for the disputed action was not thought unduly costly. In short,

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[4] In *Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425 (D.C. Cir. 1987), we authorized limited discovery for the plaintiffs prior to the determination of qualified immunity on a summary judgment motion. But we permitted this discovery as a one-time exception since our "approach to pretrial development of cases . . . [involving unconstitutional motives] was far from clear and certain when the district court made its rulings in Martin's [plaintiff's] favor." *Id.* at 1436. Indeed, we stressed in the denial of rehearing *en banc* that the discovery was permitted in *Martin* "only because of special exigencies in the particular case." *Bartlett v. Bowen*, 824 F.2d 1240, 1245 (D.C. Cir. 1987) (statement of Ruth B. Ginsburg, J., concurring in the denial of rehearing *en banc*). Thus, we made clear that if a plaintiff failed to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately.

[5] A non-member of a protected class under Title VII has a much higher burden to allege a *prima facie* case. *See Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Cir. 1983).

the legislation was construed to provide a plaintiff in a protected class with a rather easy path to a full trial on his or her claim of discrimination. But the Supreme Court has "never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII . . . ." *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that a racially discriminatory purpose must be proved to support an action under the fifth amendment). And as we have noted, the Supreme Court in *Bivens* actions, unlike in statutory discrimination cases, has thought that the desirability of early dismissal of marginal damage claims against federal officials as a matter of policy overrode the interests of plaintiffs in easily getting to trial on those cases.

Appellant stresses that we have applied the Title VII framework in section 1983 discrimination cases under the equal protection component of the fifth amendment, *see Oates v. District of Columbia*, 824 F.2d 87 (D.C. Cir. 1987), and therefore we would create inconsistent constitutional adjudication by refusing to extend the framework to *Bivens* actions. She further contends that this inconsistency between *Bivens* claims and section 1983 actions would impermissibly draw distinctions between immunities for federal officials and state officials. *See Butz v. Economou*, 438 U.S. 478, 504 (1978).

Oates was a section 1983 claim for alleged sex discrimination against a physical education teacher at a District of Columbia public high school. The case reached this court on appeal from a judgment for the defendant following a two-day trial. We affirmed. In the process, we invoked the Title VII analytical framework, as did the district court. The defendant, successful in both courts, apparently did not contest that approach. The relevance of *Harlow* to a section 1983 action was simply not considered in *Oates*. That decision preceded our resolution of the pleading issue in *Martin v. Malhoyt*. We cannot count as controlling a decision that never touched upon the is-

sue we confront, all the more so when the outcome on appeal was unaffected by the point.

Alternatively, Whitacre contends that even under a stringent pleading requirement she has satisfied our standard because her *amended* complaint alleged additional facts indicating that Davey has discriminated against older workers in the past. It is alleged that, of the 20 professional appointments Davey had made between 1981 and 1985, only three involved individuals over 50, and Whitacre herself was the subject of two of those appointments. According to the complaint, the remaining appointments involved people under 42.[6] Of course this is still circumstantial rather than direct evidence, but, in any event, we agree with the district court that the proffered statistics would be inadequate even in a statutory context. Without evidence of the pool of available and qualified applicants, we could not know whether the "three selections is [sic] disproportionately small to the pool, disproportionately large, or approximately statistically perfect." *Whitacre v. Davey*, No. 87-02762 (D.D.C. Aug. 29, 1988) at 8. Therefore, Whitacre's allegations of statistical disparity would not meet even Title VII's liberal evidentiary standards. *See Hazelwood School Dist. v. United States*, 433 U.S. 299, 311-13 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977).

III.

Whitacre's complaint also alleged a *Bivens* claim against Flynn for violating her due process right to a fair and impartial administrative review of her demotion. The district court dismissed this charge, concluding that a "failure to recuse" has never been the foundation for a *Bivens* action. To be sure, appellant was entitled under

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[6] Appellant curiously cut off the statistical analysis at age 42, rather than the age 40 suggested by the ADEA. We do not know whether the statistical allegation would markedly change if the line had been drawn at age 40.

the Due Process Clause to an administrative factfinder free from severe personal conflicts of interests. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). The issue for us, however, is not whether we would have recused ourselves if we were in Flynn's position; instead, the question is whether the constitutional right to a disinterested factfinder requires recusal of Flynn because of Flynn's "friendship" with Mayer, the person who eventually obtained the Chief Deputy Clerk job.

We do not think those facts are of constitutional significance. The Supreme Court has held that a conflict of interest on the part of a judge (or administrative adjudicator, *see Gibson*, 411 U.S. at 579) predicated on a "direct, personal, substantial, [and] pecuniary" stake in the outcome of a case can violate the due process clause. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-26 (1986) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) and *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)) (internal quotation marks omitted). *See also Connally v. Georgia*, 429 U.S. 245 (1977). However, the Court has also indicated that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion." *Tumey*, 273 U.S. at 523. Neither the Supreme Court nor any other court that we can determine has thought an adjudicator's mere friendship with a party jeopardizes constitutional due process. Although the Supreme Court has not elaborated a specific standard, the Court has said that "only in the most extreme of cases would disqualification on the basis [of bias or prejudice by a judge] be constitutionally required." *Lavoie*, 475 U.S. at 813. *Lavoie* rejected as insufficient a judge's alleged "general frustration" and "general hostility" toward one of the parties. *See id.* at 820-21. We think appellant's allegations here similarly fall far short of a constitutional violation. Indeed, recognizing a constitutional claim

based on appellant's bare allegation of "friendship" would trivialize the due process clause.[7]

Accordingly, we affirm the district court's dismissal of appellant's complaint.

[7] Since we conclude the allegations do not make out any constitutional violation, we need not decide, as did the district court, whether Flynn's qualified immunity would shield her from suit.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5339

MARGARET T. WHITACRE,
Appellant

v.

JAMES F. DAVEY, *et al.*

[Filed Jan. 5, 1990]

BEFORE: Ruth B. Ginsburg, Silberman and Buckley, Circuit Judges

ORDER

Upon consideration of Appellant's Petition for Rehearing, filed December 15, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

For the Court:
CONSTANCE L. DUPRE, Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5339

MARGARET T. WHITACRE,
Appellant

v.

JAMES F. DAVEY, *et al.*

[Filed Jan. 5, 1990]

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges.

ORDER

Appellant's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

For the Court:
CONSTANCE L. DUPRE, Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Chief Judge Wald and Circuit Judge Sentelle did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-5339

MARGARET T. WHITACRE,
Appellant

v.

JAMES F. DAVEY, *et al.*

Appeal from the United States District Court
for the District of Columbia

[Filed Nov. 17, 1989]

Before: RUTH B. GINSBURG, SILBERMAN, and BUCKLEY, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE, Clerk

Date: November 17, 1989
Opinion for the Court filed by Circuit Judge Silberman.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-2762

MARGARET T. WHITACRE,
14627 Monmouth Drive
Laurel, MD 10707,

Plaintiff,

v.

JAMES F. DAVEY,
3444 Surrey Lane,
Falls Church, VA 22042,

and

LEE ANN FLYNN,
3019 South Buchanan Street
Apartment C-2
Arlington, VA 22206,

Defendants.

[Filed Aug. 30, 1988]

MEMORANDUM OF LAW

The Plaintiff, Margaret T. Whitacre, brought this action in October of 1987 against James F. Davey, the Clerk of the United States District Court for District of Columbia, and Lee Ann Flynn, the Administrative Assistant to the Chief Judge of the United States District Court for the District of Columbia and the Equal Employment Opportunity (EEO) Coordinator for the District Court under its discrimination complaints procedures. Ms. Whitacre alleged that in an August 1985

reorganization of the management of the Clerk's Office, Davey discriminated against her because of her age. In that reorganization Davey abolished the two Assistant Clerk positions, one of which had previously been held by Plaintiff, and created a single Chief Deputy Clerk position. Ms. Whitacre applied for the vacancy as Chief Deputy Clerk. Nancy Mayer, previously the other Assistant Clerk and a younger person with a lower grade than Ms. Whitacre, was the successful applicant. Ms. Whitacre was left with a lower level, non-supervisory staff position; one, according to her complaint, "without real duties or any responsibilities."

Ms. Whitacre complained to Flynn in her capacity as EEO Coordinator and in the complaint asked Flynn to recuse herself from dealing with the complaint because of "defendant Flynn's close personal contact and well-known friendship with Nancy Mayer, the person who most benefited from defendant Davey's act of age discrimination against Plaintiff, and her long association with defendant Davey himself . . . ." Flynn declined to recuse herself, conducted a "factfinding/investigation" without an evidentiary hearing requested by Whitacre, and ultimately found that Davey had not committeed any act of age discrimination. Plaintiff appealed to Chief Judge Robinson who summarily affirmed Flynn's finding of no discrimination. Plaintiff then brought this action.

In February of 1988 the undersigned, sitting by designation as a Judge of the United States District Court, heard the matter on the motions of Flynn and Davey to dismiss the action pursuant to Rule 12(b)(6) because of Plaintiff's failure to state a claim upon which relief may be granted and because of the official immunity of both defendants. The court allowed Flynn's Motion to Dismiss but permitted Plaintiff to replead as to the Defendant Davey. Plaintiff's Amended Complaint is now before the court on a Motion for Reconsideration as to Defendant Flynn and Davey's renewed Motion to Dismiss the

Amended Complaint. For the reasons set out below, the court denies Whitacre's Motion for Reconsideration as to the Complaint against Flynn and grants Davey's Motion for Dismissal, both by order filed contemporaneously herewith.

I. The Claim Against Flynn

As the undersigned previously noted in open court at the hearing of the original Motions to Dismiss, the only complaint against Flynn, other than her failure to rule in Plaintiff's favor in her quasi-judicial capacity as EEO Coordinator, is that she failed to recuse herself. It would appear obvious that her failure to rule in Plaintiff's favor could not by itself support a constitutional tort action like the one pursued here, but if it could, certainly the same is insulated by Chief Judge Robinson's affirmance. In any event, it seems rather well established that disciplinary action, even including discharge, of federal employees though it be in alleged violation of constitutional right does not support a constitutional tort action like the one alleged here where there is an adequate alternative remedy. *Bush v. Lucas*, 462 U.S. 367, 378 (1983). Here there is.

Thus, if Plaintiff has a *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), type constitutional tort action against Flynn, it must be on the basis that her failure to recuse constituted a violation of the due process rights of Plaintiff. As this court previously held, it did not. The Amended Complaint contains nothing that causes this court to reconsider the earlier decision. Plaintiff has shown this court no authority that a failure to recuse in an administrative proceeding or a quasi-judicial hearing has ever been the foundation for a *Bivens* action nor has the court independently found any. Even in cases of direct appeal, as opposed to constitutional tort, the Supreme Court has stated that ". . . only in the most extreme of cases would disqualification . . . be constitutionally required . . ."

Aetna Life Ins., Co. v. Lavoie, 475 U.S. 813, 821 (1986). General allegations of friendship between an administrative assistant functioning in a quasi-judicial capacity and a stranger to the administrative proceeding, who happened to be the beneficiary of the questioned act, simply does not create such an extreme case, even if failure to recuse could otherwise be the basis of a *Bivens*-type action. Certainly it is not necessary to decide whether a failure to recuse ever could be the basis, although this court doubts it, but the present allegation is not that case, even if one does exist. Not only law but also common sense seems to underline this conclusion in the present case. The EEO plan obviously requires the function of someone in the agency. The existence of anyone within the agency who could not be said to have been associated with anybody in a claimed case appears so unlikely that recusal of all possible employees would seem a real possibility were Plaintiff's standards applied.

Finally, even if an action were otherwise stated, Flynn's dismissal motion was well taken in that her qualified immunity protects her in the present circumstances.[1] The Supreme Court has clearly held that

> government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1981).

Plaintiff argues that *Harlow* is distinguishable because, in plaintiff's view, the quasi-judicial function here is not

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[1] Defendant Flynn contends that she is entitled to an absolute judicial immunity in this capacity. *Cf. Spaulding v. Nielsen*, 599 F.2d 728, 729 (5th Cir. 1979). Plaintiff contests Flynn's entitlement to that absolute immunity. *Cf. Butz v. Economou*, 438 U.S. 478, 513-15 (1978). In view of the court's holding, *infra*, that qualified immunity is sufficient to protect Defendant Flynn against this claim, the court will not reach the judicial immunity question.

"discretionary" and *Harlow* spoke to summary judgment proceedings rather than motion to dismiss. Neither of these distinctions makes any difference in this case. The nature of the quasi-judicial function, in this court's view, entitles defendant, if anything, to more rather than less immunity protection. Since *Harlow*, the Supreme Court has held

> [u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). The right to recusal is not established in any clear body of prior law nor is the right to an evidentiary hearing. Plaintiff's proposed amendment to complaint, setting out that Flynn had granted evidentiary hearings in another case or cases and that some other EEO Coordinator had once recused do nothing to cure that lack of clarity and the court will deny the motion for reconsideration.

II. The Claims Against Davey

It is important to note at the outset that plaintiff's purported claim against Davey arises as a constitutional tort similar to *Bivens* not under the federal government employment section of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 633a, which covers most governmental agencies but does not apply to non-competitive positions in the Judicial Branch. Plaintiffs in *Bivens*-type actions seeking damages against government officials are held to

> ". . . a heightened pleading standard," . . . wherein plaintiffs must, at the very least, specify the "clearly established" rights they allege to have been violated with "sufficient[ ] precis[ion] to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a sum-

> mary judgment motion on qualified immunity grounds."

Martin v. Malhoyt, 830 F.2d 237, 254 (D.C. Cir. 1987) (quoting *Smith v. Nixon*, 807 F.2d 197, 200 (D.C. Cir. 1986) and *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984)).

It is also the law of this Circuit that this "heightened pleading standard" requires a determination that " 'plaintiff's complaint alleges concrete facts . . . casting doubt on the objective reasonableness' of the defendants' actions." *Martin v. Malhoyt*, 830 F.2d at 254 n.40 (quoting *Smith v. Nixon*, 807 F.2d at 201). Plaintiff's original Complaint merely alleged bare conclusions that Defendant Davey acted with the requisite intent to discriminate against her on the basis of her age.[2] *Martin v. Malhoyt*, expressly applies the above mentioned "heightened pleading standard" to require constitutional tort plaintiffs to come forward with "nonconclusory allegations of evidence" to survive motions to dismiss. *Martin v. Malhoyt*, 830 F.2d at 237 (quoting *Hobson v. Wilson*, 737 F.2d at 29). This the original Complaint did not do and this court gave Plaintiff leave to amend.

Plaintiff's proffered Amended Complaint does not cure the defect. The new allegation adds only what Plaintiff apparently deems to be a statistical foundation for a pattern or practice of age discrimination. Those allegations stated in their entirety:

> [f]rom January 1981 until December 1985, [d]efendant Davey has made 20 appointments to professional positions, including supervisory positions, within the Clerk's Office. Of these, only three times did he select an individual age 50 or over, and twice, that individual was the Plaintiff, Ms. Whitacre. In all the

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[2] Discriminatory purpose or intent is an essential element of a constitutional tort action for discrimination in employment. *Washington v. Davis*, 426 U.S. 229 (1976).

> remaining selections, the individuals were age 42 or under at the time of selection. The average age of these selectees at the time of selection was 35.3 years of age.

Amended Complaint ¶ 19. Assuming that circumstantial evidence, including statistical evidence of a pattern or practice, may be sufficient to establish discriminatory purpose or intent for the purpose of an equal protection claim in a *Bivens*-type action by a disadvantaged employee,[3] the current allegations are not sufficient. This is not a statutory claim. It is not enough to make out a prima facie case that Plaintiff is a member of the protected class; that she was qualified for the positions; that she was disadvantaged by Defendant's action; and that the person chosen was outside the protected class. *Compare Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This is a Fifth Amendment due process-equal protection claim and the Supreme Court has squarely rejected the use of the Title VII-type analysis employed in ADEA cases for this type of proceeding. *Washington v. Davis*, 426 U.S. at 239. Even if this were a statutory claim, statistical evidence of disparate impact is competent only where it accurately reflects the available pool of applicants. *See Hazelwood School District v. United States*, 433 U.S. 299, 311-13 (1977). Plaintiff's amended complaint supplies us none of this. It may be that three selections is disproportionately small to the pool, disproportionately large or approximately statistically perfect. Plaintiff does not say. The court does not know. There is no other allegation to meet the above-described heightened standard. Plaintiff's Complaint still fails. The Motion to Dismiss is allowed.

This the 29th day of August, 1988.

/s/ [Illegible]
United States Circuit Judge
Sitting by Designation

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[3] *But see Washington v. Davis*, 426 U.S. at 239.